# C. R. Adams Trucking, Inc., and Michael Cates and Bruce F. Pine. Case 14-CA-12997

June 30, 1982

## **DECISION AND ORDER**

# By Members Fanning, Jenkins, and Zimmerman

On March 4, 1982, Administrative Law Judge Robert C. Batson issued the attached Decision in this proceeding. Thereafter, Respondents, C. R. Adams Trucking, Inc., and Michael Cates, filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions<sup>2</sup> of the Administrative Law Judge and to adopt his recommended Order, as modified and restated herein.<sup>3</sup>

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified and set out in full below, and hereby orders that the Respondents, C. R. Adams Trucking, Inc., and Michael Cates, Valley Park, Missouri, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

<sup>1</sup> Respondents have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

\* Respondents have excepted to the fairness of the backpay award asserting that the Board should assume partial responsibility because of the delay between hearing date and issuance of the Administrative Law Judge's Decision, a period of more than 2 years. We find no merit to this exception. Although we do not condone the delay, it was Respondents who unlawfully terminated Pine and Becker and therefore must make these employees whole for this unlawful conduct. Such a determination is not unfair to Respondents since at any time they wished they could have avoided futher liability by offering Pine and Becker reinstatement.

<sup>3</sup> We have modified the Administrative Law Judge's recommended Order to include the narrow injunctive language "in any like or related manner" as we have concluded that a broad remedial order is inappropriate as it has not been shown that Respondents have a proclivity to violate the Act or have engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

The Administrative Law Judge inadvertently failed to require Respondents to expunge from their records any references to the discharges of Pine and Becker and, further, to require Respondents to notify the Regional Director for Region 14 of the steps they take to comply with the recommended Order. We have modified the recommended Order accordingly

- (a) Instructing their employees to join the Union, Local 682, in compliance with a valid "union security" clause, but to do so by falsified application stating that they are "owner-operators" of the vehicles they drive in order that Respondents will not have to make payments to the Union for them for the benefits of the health and welfare plan.
- (b) Instructing their employees that they must join the Union prior to the 30-day grace period provided by the contract and law, or be terminated
- (c) Threatening their employees with termination for failure to join the Union by falsified application as directed by Respondents.
- (d) Discharging Bruce F. Pine and Robert Becker for engaging in union or other protected concerted activities, and thereafter failing and refusing to reinstate them.
- (e) In any like or related manner interfering with, restraining, or coercing their employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action designed to effectuate the purposes of the Act:
- (a) Offer Bruce F. Pine and Robert Becker immediate and full reinstatement to their former positions or, if those positions are no longer available, to substantially equivalent positions, without loss of seniority or other employee benefits previously enjoyed, and to make them whole for any losses they may have sustained by reason of their unlawful discharges, with interest thereon as set forth in the section of the attached Decision entitled "The Remedy."<sup>4</sup>
- (b) Expunge from our files any references to the discharges of Bruce F. Pine and Robert Becker on September 10, 1979, and notify them in writing that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel actions against them.
- (c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records, and all other records necessary to analyze the amount of backpay due under the terms of this Order.
- (d) Post at all their places of business in and around St. Louis, Missouri, copies of the attached notice marked "Appendix." Copies of said notice,

<sup>&</sup>lt;sup>4</sup> In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

<sup>5</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

on forms provided by the Regional Director for Region 14, after being duly signed by Respondents' representatives, shall be posted by Respondents immediately upon receipt thereof, and maintained by them for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps Respondents have taken to comply herewith.

#### **APPENDIX**

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT instruct our employees to falsify their applications for union membership by telling the Union they are "owner-operators" of the vehicles they drive to avoid payment for health, welfare and supplemental benefits provided by the collective-bargaining agreement.

WE WILL NOT threaten to discharge our employees for refusing to falsify their applications for union membership as instructed by us.

WE WILL NOT require our employees to join the Union prior to 31 days after their employment commences as provided in the collectivebargaining agreement.

WE WILL NOT interfere with, restrain, or coerce our employees by discharging them because they have engaged in union or other protected concerted activities for the purpose of collective bargaining or other mutual aid or protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL offer our employees, Bruce Pine and Robert Becker, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or

other rights and privileges previously enjoyed, and WE WILL make them whole for any loss of earnings, with interest, they may have suffered as a result of the discrimination practiced against them.

WE WILL expunge from our files any references to the discharges of Bruce F. Pine and Robert Becker on September 10, 1979, and WE WILL notify them in writing that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel actions against them.

# C. R. Adams Trucking, Inc., and Michael Cates

#### DECISION

#### STATEMENT OF THE CASE

ROBERT C. BATSON, Administrative Law Judge: This proceeding under the National Labor Relations Act, as amended, 29 U.S.C. § 151, et seq. (herein the Act), was heard before me on various dates in 1980 in St. Louis, Missouri, based on an amended complaint and notice of hearing issued by the Acting Regional Director for Region 14, on December 27, 1979, and an amended charge filed by Bruce F. Pine on November 6, 1979, alleging violations of the Act against both Adams and Michael Cates.

The complaint alleges that C. R. Adams, president of Adams Trucking, Inc., violated Section 8(a)(1) of the Act in four particular instances between August 27 and September 10 by various instructions and threats to its employees regarding their joining Construction, Building Material, Ice and Coal, Laundry, Dry Cleaning and Industrial Laundry and Dry Cleaning Drivers, Helpers, Warehousemen, Yardmen and Allied Workers, Local No. 682, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called the Union), with whom Adams had a collective-bargaining agreement. The complaint further alleges that on or about September 10, Respondent Adams discharged its employee, Bruce F. Pine, and on the same date Respondents Adams and Cates discharged their employee Robert Becker, and that for remedial purposes under the Act as to Becker, Adams and Cates were at material times affiliated business enterprises with common management and supervision, and formulated and administered a common labor policy affecting employees of the operation and held themselves out to the public as a single or joint employer.

The General Counsel concedes that unless it is found that Adams and Cates are a joint or a single employer, the Board does not have jurisdiction over Michael Cates under its established discretionary jurisdictional standards. Thus, a threshold issue is the joint or single em-

All dates hereafter occurred during the calendar year of 1979 unless otherwise indicated.

ployer status of Adams and Cates, which is denied by Respondents Adams and Cates.

All issues were fully litigated at the hearing. All parties participated throughout by counsel, were afforded full opportunity to present evidence and arguments; to make oral arguments and to file post-hearing briefs. Briefs have been received from the General Counsel and Respondents Adams and Cates.<sup>2</sup>

Upon the entire record in this case, including consideration of briefs and oral arguments, and my observation of the testimonial demeanor of the witnesses testifying under oath, and upon substantial reliable evidence I make the following:

#### FINDINGS OF FACT

#### I. JURISDICTION

#### A. The Business of C. R. Adams Trucking, Inc.

The amended complaint alleges, and Respondent Adams' answer thereto, as further amended by stipulation at the hearing, admits that Adams is, and was at all times material herein, a corporation duly authorized to do business under the laws of the State of Missouri with an office and place of business located at 25 Vance Road, Valley Park, Missouri, where it was engaged in the business of providing intrastate transportation of freight, including sand, gravel, and related products.

During the 12-month period preceeding the issuance of the operative complaint herein, which period is representative of all times material herein, Respondent Adams, in the course and conduct of its business operation, derived gross revenues in excess of \$250,000 and performed services valued in excess of \$50,000 for enterprises, specifically Westlake Quarry (herein referred to as Westlake), which meets one of the Board's jurisdictional standards, other than solely direct inflow or outflow of materials and goods.

Accordingly, as alleged in the complaint and admitted by Adams, I find that Respondent Adams was, and is, an employer as defined in Section 2(2) of the Act and engaged in commerce and in operations affecting commerce as defined in Section 2(6) and (7) of the Act.

### B. The Business of Michael Cates

The complaint alleges that at all times material herein Michael Cates was an individual proprietor doing business under the trade name and style of Michael Cates and maintained its principal office and place of business at 25 Vance Road, Valley Park, Missouri, where he was engaged in the business of providing intrastate transportation of freight, including sand, gravel, and related products. Cates' answer to the amended complaint denied each and every allegation therein pertaining to Cates, including the allegation that he was an employer within the meaning of the Act. The undisputed record evidence at the hearing, including the unrefuted testimo-

ny of Cates, Adams, and Robert Becker, among others, establishes conclusively that, relevant here, Cates was a sole proprietorship; however, notwithstanding the complaint allegation that Cates did business under the trade name of Michael Cates, the undisputed evidence establishes that as relevant here Cates did business under the name of C. R. Adams Trucking, Inc.

The undisputed evidence at the hearing establishes that Cates derived gross revenues of \$36,624.95 during the calendar year of 1979 as a result of the sole proprietorship from C. R. Adams Trucking, Inc.<sup>3</sup>

#### C. The Single or Joint Employer Status of Adams and Cates

The relevant facts pertinent to this issue are not in dispute. Adams has been engaged in the business of intrastate hauling for an undisclosed number of years, primarily for Westlake Quarry. In the course and conduct of this business Adams owned, or held title to, seven trucks, apparently all dump trucks, and at material times herein leased from other individuals four additional trucks. In the spring of 1979, Michael Cates, a long-time friend of Adams, who was employed on a full-time basis as service manager for Peterbuilt Industries of St. Louis, purchased on an extended payment plan a 1979 Ford dump truck, herein sometimes referred to as the green Ford, which he leased to Adams for Adams' use in the course and conduct of his contract with Westlake Quarry under an oral agreement. The name C. R. Trucking, Inc., was placed upon the doors of Cates' truck and it, thereafter, operated along with Adams' other trucks and in the same manner and under the same supervision as Adams' other drivers. Adams' agreement with Cates provided that Adams would pay Cates 95 percent of the revenues generated by Cates' truck in its operations between Westlake Quarries No. 1 and 2, and various construction or industrial sites in the St. Louis area.

The agreement further provided that Cates was responsible for all costs involved in the operational maintenance of his truck including licensing, taxing, repairs, gasoline, and other necessary equipment for the operation of his vehicle. Adams executed a collective-bargaining agreement with the Union in 1978 which had certain provisions relating to his drivers becoming members of the Union (the union-security clause) whereas Cates had no agreement with the Union. However, as discussed more fully herein, the driver of Cates' vehicle was also required to be a member of the Union. The agreement further provided that the drivers would be paid one third of the gross revenue derived by their trucks or the minimum union scale, whichever was greater. The same schedule of payments for services was adopted by Cates. Adams' drivers did the routine maintenance on their own vehicles, whereas, according to the

<sup>&</sup>lt;sup>2</sup> Adams and Cates were represented by the same counsel at the hearing and a brief on behalf of both Adams and Cates was filed by the same counsel. However, counsel noted that the filing of such joint post-hearing brief did not in any way waive the contention that the two were separate employers.

<sup>&</sup>lt;sup>3</sup> The hearing testimony of Cates and Adams establishes that Cates did not commence operations in conjunction with Adams until spring, March or April 1979. However, the General Counsel does not urge a projection of Cates' revenue from this operation apparently because the business in which they were engaged is seasonal and does not operate during several winter months. As heretofore noted, the General Counsel conceded that Cates does not meet the Board's discretionary jurisdictional standards unless it is found that he is a joint or single employer with Adams.

testimony of Adams and Cates, Cates performed the routine maintenance on his own vehicle. Cates performed this maintenance upon his own vehicle at his home, which was located some 35 miles from the office of Adams on weekends. Cates additionally maintained the bookkeeping system for his truck, and each Friday issued a check in his own name to the driver of his vehicle.

Testimony of Adams and Cates indicates that Cates' driver was given work only when there was excess work and Adams' drivers, along with those drivers of the trucks owned and operated by Westlake Quarry had more work than they could handle. However, there is no example when Cates' driver was not provided work in a rotating manner with those of Adams and the Westlake drivers.

There is no dispute that the drivers of Cates' truck was held out to the public to be a driver for Adams, inasmuch as Adams' name was printed on the doors of Cates' truck as it was on the doors of his own trucks. Respondent contends that while Cates looked to Adams for recommendations for drivers of his truck he, nonetheless, checked them out personally and approved them. However, the record does not establish that to be the case. Indeed, Becker testified that the only time he saw Cates was when he went to Cates on Friday evening to pick up his paycheck and the only time he talked with him on the telephone was on the day of his discharge. It is undisputed that when the driver of Cates' truck quit in early August, Adams recommended to Cates that Becker, one of Adams' former drivers, be put on Cates' truck, and Cates made no further investigation concerning the qualifications of Becker. While the joint Respondent contends that Cates had a veto power over decisions made by Adams, it is clear that these were never exercised and that Adams had, and exercised, the authority to reprimand the driver of Cates' truck for such matters as not hauling full loads, or enough loads, or for other infractions of Adams' rules. There is no evidence that Adams ever consulted Cates in these matters.

It is not necessary, as argued by Respondent, that there be any joint ownership between the two enterprises or that the officers, directors, and agents of each be the same.

Here, at the very least, the undisputed evidence establishes that Cates and Adams share or codetermine those matters governing the essential terms of the drivers of Cates' vehicle. The Board has held that where two employers "share, or codetermine those matters governing the essential terms and conditions of employment" they are to be considered joint employers for purposes of the Act. The Greyhound Corporation (Southern Greyhound Lines Division) and Floors, Inc. of Florida, 153 NLRB 1488, 1495 (1965), enfd. 368 F.2d 778 (5th Cir. 1966); Manpower, Inc., of Shelby County and Armour Grocery Product Co., Division of Armour and Company, 164 NLRB 287, 288 (1967).

Here, accepting at face value the testimony of Cates and Adams, it is evident that at the very least they shared and codetermined the working conditions of the drivers of Cates' vehicle. It is evident that because of Cates full-time employment with Peterbuilt, Inc., of St. Louis, he would have little time during the working day,

and during the working day of the truckdrivers, to be involved in the day-to-day operations of his truck or drivers or the labor relations policies concerning Cates' drivers and that they were held out to the public to be a single or joint employer and a single operating entity. It appears that Cates did involve himself in the business, and assumed certain responsibilities of the business, particularly that of the operation of his own vehicle, but that Adams controlled the day-to-day activities so far as the deliveries and so forth were concerned, in conjunction with the dispatchers of Westlake.

The Board has held that where the commerce data of a corporate partner alone meets the Board's commerce standards it is sufficient to assert jurisdiction over the entire enterprise Leavitt J. Cofer, Eunice Cofer, and Travelodge International, Inc., a Partnership, d/b/a Marysville Travelodge, 233 NLRB 527 (1977). Accordingly, I find that C. R. Adams Trucking, Inc., and Michael Cates were joint employers as to the driver of Cates' vehicle.

#### II. THE LABOR ORGANIZATION

The complaint alleges, and the answer of Respondent Adams admits, that Construction, Building Materials, Ice and Coal, Laundry, Dry Cleaning and Industrial Laundry and Dry Cleaning Drivers, Helpers, Warehousemen, Yardmen and Allied Workers, Local No. 682, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is, and was at all times material herein, a labor organization within the meaning of Section 2(5) of the Act. While the answer of Respondent Cates denies this allegation, as found above, they are joint employers and accordingly the admission of Respondent Adams is sufficient to find them to be a labor organization within the meaning of Section 2(5) of the Act, I so find.

# III. THE ALLEGED UNFAIR LABOR PRACTICES

The events giving rise to the complaint allegations here commenced between mid and late August, and culminated in the discharge of Bruce F. Pine and Robert D. Becker on September 10.

By way of background, the collective-bargaining agreement between Adams and the Union provides the usual union-security clause. The agreement also contains a provision which excludes from the terms of the agreement "owner-operators" who are employed by the employer, and section 2 of the agreement defines the term owner-operators. 5

<sup>4</sup> Sec. 5 of said agreement provides: "It is understood and agreed by and between the parties hereto that as a condition of continuing employment all persons who were hereafter employed by the employer in the unit is subject to this agreement shall become members of the Union and not later than the thirty-first (31st) day following the beginning of their employment or the execution of this agreement whichever is the later

B Sec. 2 of the agreement provides: "the term 'owner-operators' shall be construed to mean those persons who own, lease, rent or borrow equipment which they personally drive in the performance of their duties as employees of an employer covered by this agreement. It being the intention of the parties to limit the provisions of this article to situations where owner-operators personally drive the equipment they own, lease, rent or borrow, it is understood and agreed that nothing herein shall

Pine commenced working for Adams about the second week of May and Becker commenced his employment about mid-June. During the course of Becker's employment by Adams he drove three different trucks. He first drove a 1969 Ford dump truck owned or leased to Adams and did so until mid-July when Adams transferred him to a 1978 Mack truck, also owned or leased by Adams, and in early August Becker was again transferred to the 1979 Ford truck owned by Cates. At this time, according to Becker, he asked Adams if he would still be working for Adams. Adams replied that he would still be an employee of Adams.

About the middle of August, Becker was stopped at the "Chevrolet jobsite" and asked by a union steward for his union card. Upon being told that he did not have a card, the steward told him that he could not operate on that jobsite without a union card. About the same time, another employee, Steve Fieser, was stopped at another jobsite by the job steward and was given the same information. The record is not clear whether Becker or Fieser reported this incident to Adams or whether Adams learned of it in some other way. Fieser had commenced work with Adams about July 15. Be that as it may, in late August Adams called Pine, Becker, Fieser, and another employee, Keith Middleton, together, all of whom were not members of the Union and informed them that they had to become members of the Union. Also in attendance at this meeting was Adams' senior driver, Tom Mills, who was a member of the Union. It is at this meeting that the first credibility issues are raised. Pine and Becker testified that Adams instructed them that they would have to go to the union office and obtain their union membership cards, but directed that they tell the Union that they owned their own trucks, inasmuch as he, Adams, could not afford to pay health and welfare benefits on them.6

According to Adams, Mills, Fieser, and Middleton, Adams said nothing about informing the Union that they owned their own truck to avoid payment of the health and welfare benefits, but merely told them to join the Union if they wanted to work out of the Westlake Quarry anymore.

A few days later, on September 4, Fieser and Middleton went to the union hall where they informed the union office secretary, Carol Eaton, that they were owner-operators of their own vehicles and did not disclose the fact that they drove exclusively or primarily for Adams. This is also reflected in their application for membership in the Union dated September 4. While it is true that Middleton owned two trucks, he did not drive either of the trucks that he owned and the record is unclear as to whether or not they were leased to Adams but merely driven by other drivers.

In this regard, as in others, I credit the testimony of Pine and Becker over that of Adams, Fieser, Middleton, and Mills for the following reasons: in addition to their demeanor while testifying under oath, which consisted of evasive answers and contradictory testimony, the record discloses that at all times material herein, of the 11 drivers employed by Adams, he paid the health, welfare, and supplemental benefits on only four of those drivers. In my view this warrants an inference that Adams was endeavoring to avoid the payment for these benefits for his drivers to the extent possible. Thus, I find it more probable that he did instruct the four nonunion drivers with whom he was talking to tell the Union that they were owner-operators of their own vehicles. With respect to Fieser and Middleton, notwithstanding their testimony that Adams gave no such instructions, they nonetheless erroneously informed the Union that they were owneroperators of the vehicles which they drove and failed to disclose that they drove primarily for Adams. They did not explain at the hearing why they choose to do this and thus deprive themselves of the benefits to be derived of the payment of these funds to the Union's health, welfare, and supplemental benefits program.

Accordingly, I find as alleged by the General Counsel that on or about August 27 Respondent Adams instructed its employees to join the Union, but to falsify the information they gave the Union and tell them that they owned their own trucks in order that Adams would not have to pay union health and welfare benefits for them.

A second complaint allegation arising out of this same conversation is based on the fact that Milton had been employed by Respondent only since August 13, and thus by requiring his membership in the Union prior to the 30-day grace period, Adams violated Section 8(a)(1) of the Act.

At the time of, or shortly after the above-discussed meeting, Pine gave Adams his personal check made payable to the Union in an amount in excess of \$300, an amount apparently sufficient to cover the initial fees for both himself and Becker, so that they would not have to lose time from work in order to obtain their membership cards. Adams admits that Pine gave him a signed personal check for this purpose and that he retained it for a few days. According to Pine, a few days later Adams returned the check to him and told him that he could not go down and join the Union for him and Becker because they knew him down there and would suspect that they were working for him. Adams, while admitting that he initially accepted the check, testified that he returned the check a few days later and told Pine that he had not had time to get to the union hall and that he and Becker would have to do so. This occurred before September

Approximately Friday, September 7, Adams again admonished Pine that he and Becker should go down to the union hall after working hours on Monday, September 10, and obtain their union membership cards.<sup>7</sup>

apply when the following circumstances exists; (A) where an employer covered by this agreement leases or rents equipment from an owner-operator thereof who does not personally drive it. (B) Where owner-drivers do not render their personal driving services in the status of employees."

do not render their personal driving services in the status of employees."

The collective-bargaining agreement also provided for the payment of health, welfare, and supplemental benefits in excess of \$100 per month for each driver employed by Adams, the signatory to the collective-bargaining agreement.

Adams denies that he spoke with Pine about joining the Union on that date. Cates contends that he admonished Becker on that date that he should go down after work on Monday and obtain his union card. Becker denies that he ever spoke with Cates concerning his joining the union.

The undisputed evidence establishes that on the morning of September 10, Pine and Becker went to the union hall for the purpose of joining the Union and advised the union secretary, Carol Eaton, that they were employed by Adams Trucking, Inc., and desired to join the Union. It developed that they did not have the necessary funds to pay the initiation charges and fees for joining the Union and they were advised by Eaton that they would have to return after 4 p.m., and see Tony Parino, business agent for Local 682, for purposes of making arrangements for deferred payment of these fees and dues. Thus, at approximately 11 o'clock on September 10, Pine and Becker reported for work at the Westlake Quarry where they made their assigned runs. Adams admits that he knew they were late reporting for work but were permitted to make their assigned runs for the remainder of

This brings us to the third and fourth 8(a)(1) allegations: (a) that Adams again repeated to employee Pine that he had to join the Union, but to tell them that he owned his own truck so that Adams would not have to pay the union health and welfare benefits, and (b) repeated the aliegation, and threatened Pine with discharge if he failed to join the Union and tell them that he owned his own truck.

The testimony, as it must in these allegations, comes from Adams and Pine. There is no dispute that about 2:30 p.m., on September 10, Pine pulled his truck up to the scales at the Westlake Quarry at which time he was approached by Adams and asked if he and Becker had joined the Union. Upon receiving a negative response, Adams again instructed Pine to go to the union hall and tell the Union that he was an owner-operator so that Adams would not have to pay the union health and welfare benefits, and that if he failed to do so Adams had a long list of drivers who could replace Pine.

I credit Pine's version of this conversation with Adams, based on Adams' poor demeanor while testifying under oath and the fact that Pine gave fairly direct and unconflicting testimony concerning this episode. Accordingly, I find that Adams again instructed his employee to join the Union but to tell them that he was an owner-operator, and that his statement that he had a long list of drivers waiting to replace Pine was clearly an implied threat of discharge for failure to do so.

### The Discharges

About 4:30 p.m., on September 10, Pine was refueling his truck at the Westlake Quarry when he was approached by Adams who, according to Adams' testimony, asked Pine if he had gotten his union card and, upon his negative response, told him that he was going to "nip it in the bud" and that he was terminated.<sup>8</sup> Pine asked

Adams if the same applied to Becker. Adams told Pine to "tell Bob to leave his keys in his truck and clean it out, that he was going too." As indicated above, considering witness demeanor, contradictions in testimony, failure to relate some events in pretrial investigative affidavits, and various inconsistencies and improbabilities of the witness' testimony considered against the undisputed background of certain events, I credit the testimony of Pine. When Becker arrived at the Quarry and Pine advised him that Adams had fired them, Becker telephoned Cates. Cates told Becker that there was nothing he could do about it, that it was up to Adams, and that he, Cates, had nothing to do with it. He further told Becker that he could pick up his last paycheck the following Friday.

Thus, concludes the credited facts leading up to and surrounding the terminations of Pine and Becker.

#### Analysis

From the post-hearing brief of counsel for the General Counsel and his oral arguments at the hearing, it appears that he is proceeding upon alternate theories that the discharges of Pine and Becker violated Section 8(a)(1) and/or (3) of the Act. He titles section B of his brief "Pine and Becker were Discharged Because They Joined the Union." However, his ensuing argument addresses the issue of their failure to join the Union on the conditions set forth by Adams; i.e., that they tell the Union they were "owner-operators" of the vehicles they drove. Citing McDowell Mfg. Co., Division of Alco Standard Corp., 198 NLRB 1229, fn. 1 (1972), when the employer takes it upon himself to enforce a union-security clause, he assumes the union's fiduciary responsibility to provide adequate notice to employees that they must join the union or be terminated. The record evidence in this case does not indicate that Local 682 ever demanded the termination of Pine or Becker for failing to join the Union. 10

Respondent contends that the continued refusal of Pine and Becker to join the Union in accordance with the collective-bargaining agreement and their obligation to the Union was the motivating factor for their discharge.<sup>11</sup>

In my view, where, as here, counsel for the General Counsel establishes by credited testimony that the employer directs his employees to join the union in accordance with a "union security clause," but instructs them to falsify their application for union membership in order that the employer may avoid payments to the union for

<sup>&</sup>lt;sup>8</sup> There is no significant credibility issue raised by the testimony of Adams and Pine as to what was said at this time. According to Pine, when Adams approached him about 4:30 p.m., Pine asked Adams if he wanted him to wait for Becker before going to the Union to obtain their cards, and Adams replied "We will have to nip it in the bud right now . . . . You guys did not do like I told you to. You went down and said you worked for me when I said for you to say you owned your own trucks."

<sup>&</sup>lt;sup>9</sup> Adams' testimony in this regard was that he told Pine that as far as he was concerned the same applied to Becker, but that Becker would have to call Cates.

<sup>10</sup> The only evidence of union "notice" that Adams was using non-carded employees at security sites was the inquiry by the union stewards at two jobsites of Becker and Fieser concerning their cards and that they could not haul to those sites until they obtained them. This falls short of the Union's demanding their termination for failure of membership.

<sup>11</sup> Respondent also appears to contend that an alternate motivating factor in these discharges was the failure of Pine and Becker to report to work timely on September 10. This version of the September 7 conversations reflect that Pine and Becker were told to go to join the Union after work on September 10. However, Respondent's version of both the 2 p.m. and 4:30 p.m. conversations with Pine is that Adams asked him if he and Becker had gotten their cards at that time.

health and welfare benefits to which his employees are entitled under the operative collective-bargaining agreement, the employer is both encouraging and discouraging union membership, both of which are violations of Section 8(a)(3) and (1) of the Act. Such employer is encouraging and discouraging union membership under the guise of enforcing the "union security clause" of his collective-bargaining agreement; but at the same time he is discouraging union membership by denying his employees benefits due them by the collective-bargaining agreement if they join the union in the manner proscribed by the employer.

There is no doubt in my mind that at the late August meeting alluded to above, Adams instructed the four nonunion members present to join the Union<sup>12</sup> and to falsify their applications for membership by stating that they were "owner-operators" of the vehicles they operated for Adams and to conceal the fact that Adams was their primary employer. The testimony of Pine and Becker to this effect, and the reasons Adams cited for these instruction, is buttressed by the fact, notwithstanding their testimony to the contrary, that Fieser and Milton, two of the nonunion employees present indeed falsified their applications as instructed. No reason for this falsification by them was advanced at the hearing, thus, an inference is warrranted that they did so as a condition of continued employment. Why else would they deny themselves the health and welfare benefits to which they were entitled by the collective-bargaining agreement?

Even assuming that Adams admonished Pine, and Cates told Becker on September 7 to go down and join the Union after work on Monday, September 10, as Adams and Cates testified, why would Adams have inquired of Pine at 2 p.m., on September 10, whether he and Becker had already gotten their union cards.

On the facts here, I am constrained to, and so find and conclude, that Adams did instruct Pine and Becker to falsify their applications for union membership in violation of his collective-bargaining agreement with the Union and that their discharge for failure to comply with such instructions violates Section 8(a)(1) and (3) of the Act. If employees are required under a valid union-security clause providing for the payment by the employer of additional significant sums for health and welfare benefits, the denial of these additional benefits to the employees as a condition of employment violates both the agreement and the Act.

Under the test of causation adopted by the Board in Wright Line, a Division of Wright Line, Inc., 251 NLRB 1083 (1980), counsel for the General Counsel has made out "a prima facie showing sufficient to support the inference that the protected conduct was a 'motivating factor' in the employer's decision." As further dictated by Wright Line, Respondent has failed to establish that such action would have taken place even in the absence of the protected conduct.

Accordingly, I find and conclude that Pine and Becker were discharged for engaging in protected concerted activity by refusing to falsify their applications for union membership by stating that they were "owner-operators" of their own vehicles.

#### CONCLUSIONS OF LAW

- 1. The jurisdiction of the Board is properly asserted in this proceeding.
- 2. By instructing its employees that they must join the Union, Local 682, but to falsify their applications for union membership by advising the Union that they were "owner-operators" of the vehicles they drove in order that Respondent would not have to pay certain health and welfare payments to the Union on their behalf, thus depriving such employees of said benefits; instructing employees that they must join the Union prior to the 30-day grace period or be terminated, and by threatening its employees with discharge if they failed to falsify their applications for union membership as directed, Respondent has violated Section 8(a)(1) of the Act.
- 3. By discharging its employees, Bruce Pine and Robert Becker, and, thereafter, failing and refusing to reinstate them, Respondent violated Section 8(a)(3) and (1) of the Act and has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) of the Act.
- 4. C. R. Adams Trucking, Inc., and Michael Cates constitute a Joint Employer with joint and several liability for all remedial action ordered herein with respect to discriminatee Robert Becker.
  - 5. Respondent has not otherwise violated the Act.

## THE REMEDY

Inasmuch as Respondent has been found quilty of violations of Section 8(a)(1) and (3) of the Act, which conduct interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed to them by Section 7 of the Act, I conclude from the totality of such unlawful conduct that this Joint Respondent should be required to cease and desist from these and other unfair labor practices and take certain affirmative actions in effectuation of the policies of the Act. Such affirmative actions of the Joint Respondent shall be that it post the usual informational notice to employees, and offer immediate and full reinstatement to its employees Bruce F. Pine and Robert Becker, to their former positions or, if those positions are no longer available, to substantially equivalent positions, without loss of seniority or other benefits, and to make them whole for any loss of earnings they may have sustained as a result of the unfair labor practices against them. All loss of earnings and other benefits due under the terms of this Order shall be computed with interest thereon in the manner prescribed in F. W. Woolworth Company, 90 NLRB 289 (1950), and Florida Steel Corporation, 231 NLRB 651 (1977).13

[Recommended Order omitted from publication.]

<sup>12</sup> Although one of the employees present, Milton, had not been employed for 30 days at the time and was not required to join the Union under any circumstances at that time.

<sup>18</sup> See, generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962).